IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 312

UNITED STATES OF AMERICA, *Petitioner*

v.

THE OHIO POWER COMPANY

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR REHEARING

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On January 28, 1957, this Court entered an order requesting The Ohio Power Company to file a response to the petition for rehearing in this case within fifteen days. Previously, on December 5, 1955, this Court denied the Government's petition for rehearing of a prior denial of a writ of certiorari, and on May 28, 1956 denied the Government's motion for leave to file a second petition for rehearing. On June 11, 1956, this Court *sua sponte* vacated the order entered on December 5, 1955, and continued the petition for rehearing (351 U.S. —). This action was presumably

taken to await the decision in the cases of *United States* v. *The Allen-Bradley Company* (No. 78) and *National Lead Co.* v. *Commissioner* (No. 124), writs of certiorari in which were granted on the same day. Both those cases were decided by written opinions delivered by the Court on January 22, 1957.

QUESTIONS PRESENTED

In *Allen-Bradley* and *National Lead* this Court decided that WPB had authority under Sec. 124 of the Internal Revenue Code of 1939 to promulgate a regulation dated October 5, 1943, and to apply that regulation to limit the amortization deductions for facilities necessary in their entirety to national defense to excess war cost where such facilities had presumptive post-war use. Accepting these decisions with respect to WPB's power to promulgate and apply this regulation, however, the additional and controlling issue presented here is the applicability of the regulation itself. There are also presented wholly unrelated procedural questions involving the timeliness of the Government's petition for a writ of certiorari and the finality of the denial by this Court of the Government's petition for rehearing. The questions now presented here are:

1. Even though WPB had statutory authority to promulgate its excess war cost regulation of October 5, 1943, did it erroneously apply the regulation to Ohio Power's facility, whose construction was commenced about two months prior to the adoption of the regulation, where that regulation and the Executive Order transferring certifying authority to WPB specifically provided that the regulation should not be applied to construction commenced prior to October 5, 1943?

2. Was the petition for a writ of certiorari to the Court of Claims timely when it was filed more than 90 days after the decision of that Court but within 90 days after the entry of the money judgment?

3. Was the litigation in *Ohio Power* brought to finality under the provisions of Rule 58(4) of this Court and of Section 452 of the Judicial Code when the Government's petition for rehearing was denied on December 5, 1955?

None of these questions was involved in either *Allen-Bradley* or *National Lead*.

STATUTES, EXECUTIVE ORDER AND REGULATIONS INVOLVED

With respect to the question presented here on the merits, there are included in a separately bound Appendix pertinent provisions of § 124 of the Internal Revenue Code of 1939 and Executive Order 9406 (8 F. R. 16955), dealing with the transfer of functions with respect to Necessity Certificates from the Secretaries of War and Navy to the Chairman of the War Production Board, as well as the full text of the War Department regulations, Issuance of Necessity Certificates (7 F. R. 4233) as they existed prior to amendment on October 5, 1943. The October 5, 1943 amendment is set forth separately.

With respect to the procedural questions involved, the separately bound Appendix includes a reproduction of the provisions of 28 U.S.C. § 2101 (c), relating to the time for applying for a writ of certiorari to this Court, and 28 U.S.C. §§ 451 and 452, relating to the expiration of a term of court as affecting the power of the court.

STATEMENT OF CASE

Ohio Power Company is engaged in generating and distributing electric power in the State of Ohio. During the war years pre-existing electrical generating facilities were inadequate to supply the war-inspired demand for power by defense industries in that area. Ohio undertook construction of a number of new facilities (R. 2-3).

To obtain the tax amortization benefits promised by Congress to private industry in Section 124 of the Internal Revenue Code of 1939 Ohio made five applications for Necessity Certificates. Four of those applications were approved and Certificates issued by the Secretary of War in 1942, 1943 and 1944. In each instance the Certificates were issued without any limitation whatever on the amount of cost which would be subject to tax amortization under Section 124 (R. 19-20).

In August 1943, Ohio commenced construction of a fifth expansion project to increase the war-time supply of electrical energy (R. 21). This project was the construction of a 100,000 kilowatt steam generating plant near Canton, Ohio, and was designated as the "Tidd Project Emergency Facility," having a cost in excess of $11,000,000 (R. 3).

Within six months after the commencement of this construction, the time period specifically provided in Section 124(f)(3), Ohio filed its application for a Necessity Certificate covering the Tidd project (R. 3, 19). On December 17, 1943, the authority to issue certificates was transferred by the President from the Secretaries of War and Navy to the War Production

Board[1] (R. 3). The WPB did not issue a certificate to Ohio until November 9, 1944, at which time it certified that the Tidd project was necessary in its entirety to national defense but purported to limit the amount of cost entitled to tax amortization under Section 124 to 35 percent of the total cost of the project, which percentage represented WPB's estimate of excess war cost[2] (R. 4-7, 12-13, 19, 27-31).

In the meantime, construction work on the Tidd project had proceeded since August 1943 (R. 21)—a period of about fifteen months—and the project was carried forward as rapidly as possible to meet the continuing war need for electric power (R. 3, 8-9, 24-25).

Ohio filed a written protest with the WPB because of the percentage limitation in its Certificate and received from the certifying agency a written statement explaining that the 35 percent limitation had been included in accord with the rule of the War Production Board to limit amortizable cost to excess war cost where the necessary facilities could be presumed to be adaptable later to peacetime use (R. 4-6,

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[1] Executive Order 9406, 8 F.R. 16964, amended by Executive Order 9429, 9 F.R. 2487. See Appendix, p. 2, for pertinent provisions of E.O. 9406.

[2] The record here shows the Board had "duly certified that all of the items included in the application for a Necessity Certificate with respect to the Tidd project were necessary in the interest of national defense," and that the 35 percent was a restriction on amortizable cost of the entirely necessary project, representing the excess of war-time cost over pre-war cost, which restriction was added by the Board because the project was presumed to have post-war utility (R. 4-8, 27-29, 33). This was so stated in a letter from the Chief of the Tax Amortization Branch in reply to the taxpayer's protest to the limitation on amortizable cost included in the certificate issued (R. 5).

27-31). Thereafter, Ohio protested that the Board had exceeded its legal authority in placing the cost limitation in the Certificate, and requested that the Certificate be corrected (R. 6). The certifying agency refused (R. 7). Ohio thereafter asserted its right to deduct the entire cost of the Tidd project in determining its tax liability for 1943, 1944, and 1945, but the Commissioner of Internal Revenue refused to allow the rapid amortization of more than 35 percent of cost. Suit in the Court of Claims followed.

As will appear hereinafter, in August 1943 when Ohio Power commenced construction work on the Tidd project, the amended regulation, which was the basis for the new rule for limiting the amortization deduction for emergency facilities to excess war cost (35 percent of total cost) in cases where such facilities had presumptive post-war use, had not been promulgated. Ohio Power obviously had no notice of this new rule at the time its construction work was started. When the regulation was published in the Federal Register on October 8, 1943, it clearly and specifically stated that it did not apply to construction commenced prior to October 5, 1943.

I. THE AMENDED REGULATIONS OF OCTOBER 5, 1943 DID NOT APPLY TO THE TIDD PROJECT BECAUSE CONSTRUCTION THEREOF HAD COMMENCED BEFORE THAT DATE.

A. THE AMENDED REGULATION OF OCTOBER 5, 1943 PROMULGATING THE EXCESS-WAR-COST RULE WAS NEVER INTENDED TO APPLY AND BY SPECIFIC LANGUAGE IN THE AMENDED REGULATION AS WELL AS EXECUTIVE ORDER 9406 DID NOT APPLY TO CONSTRUCTION COMMENCED PRIOR TO OCTOBER 5, 1943.

In August 1943 when Ohio Power commenced construction of the Tidd project, both the statute and the regulations prescribed by the Secretaries of War

and Navy specifically provided that taxpayers were entitled to commence construction of emergency facilities and make application for Necessity Certificates at any time within six months thereafter.[3] The purpose of this statutory provision was to prevent delay in undertaking essential defense projects and to encourage private industry to go forward immediately with vital construction without waiting for administrative approval.[4]

In August 1943 the regulations of the Secretaries of War and Navy contained no provision of any kind requiring that certificates of necessity for facilities necessary in their entirety should limit amortizable cost to excess war cost in cases where the facilities had presumptive post-war use. See War Department Regulations, reproduced in full in Appendix, pp. 3 to 11.

However, on October 5, 1943, about two months after construction of the Tidd project had commenced, the Secretaries of War and Navy amended their regulations, with the approval of the President because of changed economic conditions which had developed in the summer of 1943. The change was designed to put a brake on further expansion of industrial facilities.

The parties are in agreement that WPB's new excess-war-cost rule was based on this amended regulation. In its Brief in *Allen-Bradley,* the Government states (pp. 22-23):

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[3] § 124(f)(3) of the Internal Revenue Code of 1939 (Appendix, at p. 1); War Department Regulations, Issuance of Necessity Certificates, ¶7 (Appendix, at p. 10). The provision in the regulations is substantially the same as in the Code. The Code provision was never amended after August 1943.

[4] H.R. Rept. No. 11, 77th Cong., 1st Sess., pp. 3-4.

> "In essence, this [excess war cost] policy was based on the premise, explicitly stated in the regulations [amendment of October 5, 1943], that facilities were to be certified only if it was clearly in the Government's interest that they be privately financed. Hence, since any facility with clear post-war value could, if Government-financed, be readily disposed of at the end of the war, and since it was believed that, for the most part, sufficient plant capacity had already been achieved, it was concluded that, consistent with the criterion laid down in the regulations, only facilities having no post-war use would thereafter be given 100% certificates . . ."

The Government's petition for a writ of certiorari in this case confirms (p. 9) that it was upon adoption of the new regulation of October 5, 1943, that "the certifying agency began to issue less-than-100 percent necessity certificates, as well as to require that all further construction or expansion of facilities be approved in advance in order to qualify for the amortization privilege."[5] This amended regulation of the War and Navy Departments authorized for the first time the pre-determination of necessity before making any construction or acquisitions, and also for the first time required the certifying agent to consider whether it was to the advantage of the Government to have the facilities privately financed and where the facilities had presumptive post-war use to limit the amortizable cost to excess war cost.

The invariable practice of the Secretaries of War and Navy prior to the amended regulation had been to certify what portion of the physical facilities was necessary to national defense and in no instance had they limited the amortizable cost of such facilities to excess-war-cost. This is consistent with the state-

ment of this Court in the *Allen-Bradley* opinion (p. 4) that "those who were responsible for the administration of the Act consistently interpreted § 124(f) as authorizing them to certify that only a part of the costs of construction after 1939 was necessary to the national defense." As the report of Under Secretary of War Patterson (Appendix, pp. 23 to 51, at pp. 44, 45) shows, in some instances the War and Navy Departments certified only part of a facility where the facility itself was of a size or capacity greater than was determined necessary in the interest of national defense, but this type of partial certification had nothing in common with the later practice of WPB of placing an excess-war-cost limitation upon the amortizable cost of facilities necessary in their entirety to national defense except that both were expressed in terms of percentages.[5]

An examination of the affidavit of Sidney T. Thomas, Acting Chief of the Tax Amortization Branch of the WPB[6] as well as the report of Secretary Patterson,

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[5] Government Brief in *Allen-Bradley*, pp. 21-23, and n. 10, p. 22 The Patterson report states (Appendix, at p. 42):

> "The cost of a facility was in general considered a matter in the discretion of the applicant so that if the facility was appropriate and necessary, inquiry was not made as to . . . the lowest possible price or cheapest . . . construction."

See also the Patterson report in the Appendix at pages 29, 31 and 42 to 45. Indeed, War Department Regulation ¶ 5b provided that the Secretaries of War and Navy would not certify the accuracy of the cost of any facility. Appendix, at pp. 5, 6, 8, 9.

[6] The Thomas affidavit is reproduced in the Appendix to this Brief, pp. 12 to 60. It was introduced by the Government in *United States Graphite Co.* v. *Sawyer*, 339 U.S. 904 (Oct. Term, 1949, No. 532), and is also a part of the record in *Wickes Corporation* v. *United States*, 108 F. Supp. 616 (Ct. Cls., 1952), and in *National Lead Co.* v. *Commissioner*, S. Ct., Oct. Term 1956, No.

which was attached to the affidavit, will show that the amended War and Navy regulation of October 5, 1943, was a radical departure from the regulations as they existed prior to the amendment, and that great caution was taken by the Secretaries to avoid making the amendment retroactive. Also, in order to give industry proper notice and to avoid being unfair to industry, a provision was added to the amended regulation that beginning with October 5, 1943 all applications for necessity certificates had to be filed before making any constructions or acquisitions. Because this amended regulation represented a radical change in policy, the amendment of October 5, 1943 was given "extensive notoriety" in the press of the country.[7]

It is stated in the Thomas affidavit that the amended regulation of October 5, 1943 was not to apply retroactively "out of fairness to the applicant who had already spent his money or who had previously filed his application."[8] By its express terms *it did not apply to construction commenced prior to October 5, 1943.* Construction on the Ohio Power Company Tidd project was commenced in August 1943 (R. 21).

On December 17, 1943 the President transferred, by Executive Order 9406 ((Appendix, at p. 2), the cer-

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124. It is also reproduced in the *Allen-Bradley* Brief, Appendix B, pp. 1 to 53. The Thomas affidavit states that the excess-war-cost percentage limitation was predicated on Section 3-b-2 of Executive Order 9406 (8 F.R. 16955), which transferred the certifying authority to WPB. As hereinafter shown this Section in the Executive Order is in substance a restatement of the October 5, 1943, amendment to the regulations of the Secretaries of the War and Navy Departments.

[7] Thomas affidavit, *id*, at p. 17. See also Commerce Clearing House; *Standard Federal Tax Service* (1943) Vol. 3, ¶ 6533.

[8] Appendix, at p. 16.

tifying authority under Section 124(f)(1) from the Secretaries of War and Navy to the Chairman of the War Production Board. This Executive Order restated the substance of paragraph d of the amended regulation of the War and Navy Departments dated October 5, 1943 (Appendix, at p. 11), and included a positive directive to the Board that the amended regulation was not to be applied in certifying construction begun prior to October 5, 1943. This Executive Order also directed that "the regulations of the Secretary of War and the Secretary of the Navy in effect prior to October 5, 1943 shall govern the issuance of Necessity Certificates for all . . . facilities the beginning of the construction . . . of which was prior to October 5, 1943."

We submit that the specific terms of the amended regulation of October 5, 1943 and Executive Order 9406 conclusively show that the new excess-war-cost rule was never intended to apply, and by specific language did not apply to construction commenced prior to October 5, 1943.

B. THIS COURT'S DECISIONS IN ALLEN-BRADLEY AND NATIONAL LEAD ARE INAPPLICABLE BECAUSE THE QUESTION HERE IS NOT THE STATUTORY AUTHORITY OF THE WPB BUT WHETHER THE BOARD ACTED HERE IN VIOLATION OF E.O. 9406 AND THE AMENDED REGULATION OF OCTOBER 5, 1943.

The rather extended statement under the foregoing point showing the nature and timing of the administrative regulations reveals the basic difference between the present case and the two cases decided last month by this Court. All of the Certificates of Necessity involved in those cases were applied for after the new regulation of October 5, 1943 was adopted and published. Likewise, no construction or acquisition

had taken place prior to October 5 and none occurred until after the percentage certificates were issued and until after the taxpayers were advised that certificates would be issued containing the excess-war-cost percentage limitation.

In short, the new regulation of October 5, 1943, the Executive Order of December 17, 1943, and the regulations of WPB were all, by their terms, fully applicable to the certificates issued in *National Lead* and *Allen-Bradley*. The taxpayers in those cases knew about the new regulation when they filed their applications for Necessity Certificates before commencing any construction or acquisition. They accepted excess-war-cost percentage certificates, made no protest to WPB, and thereafter constructed or acquired the facilities certified with full knowledge and acceptance of the limitation included in such certificates.

Ohio Power was caught in an altogether different set of circumstances. It commenced construction of the Tidd project in August 1943, at a time when the uniform administrative practice under the the regulations then in effect was to allow tax amortization of all the cost of certified facilities necessary in their entirety to the war effort; at a time when the announced policy was to induce private industry to build necessary facilities without waiting for the administrative red-tape of certification to be unraveled; at a time when the administrative regulations themselves specifically authorized the commencement of construction first and the filing of an application for a Necessity Certificate within six months thereafter; at a time when there existed no regulation or Executive Order of any kind authorizing the certifying agency to

consider post-war utility and to place an excess-war-cost limitation on the amortizable cost of construction necessary in its entirety to national defense during the war period. Moreover, the taxpayer here proceeded with construction of the Tidd project with assurance from the widely publicized regulation of October 5, 1943, as well as the Executive Order transferring the certifying authority to the Board, that the new policy did not apply to construction commenced prior to October 5, 1943.

As the Court points out in its opinion in *Allen-Bradley* (at p. 5), after this excess-war-cost policy was adopted in 1943 "certificates issued for only a portion of the cost of necessary facilities were accepted by business in general, and respondent in particular—apparently without substantial objection." But this statement has no application to Ohio Power. Allen-Bradley, National Lead and other taxpayers commencing construction or making acquisitions after October 5, 1943, were put on notice that the Government had adopted a new policy of considering the financial advantage of private financing of new facilities acquired after that date, the result of which was that only the amount of excess war cost would be subject to rapid amortization. Applicants for certificates after October 5, 1943, where there had been no construction commenced or acquisitions made prior to that date, were required to obtain a certificate before commencing construction or making acquisitions and therefore had a choice of proceeding or not proceeding in light of the new limited policy. Ohio Power had no such choice for two reasons, (1) for its construction was commenced at a time when the announced policy was

to encourage taxpayers to commence construction or make acquisitions and apply any time within six months thereafter for certificates, and (2) the new regulation, which gave Ohio Power no warning because it was specifically made inapplicable to projects commenced prior to October 5, 1943, was not applied by WPB to its construction until the project had been under way for well over a year. It was because of this that the amended regulation was expressly made inapplicable to construction and acquisitions commenced and made prior to October 5, 1943.

The Government in its brief to this Court in the *Allen-Bradley* case expressly states that the excess-war-cost percentage policy was based on the new regulation (Govt. Brief, pp. 21-23), and that the 35 percent of cost limitation was "a deliberate policy adopted" to effectuate the new regulation and Executive Order (Govt. Brief, pp. 54-55). Consequently, the decision of this Court in *Allen-Bradley* and *National Lead* that such policy was authorized under the statute can have no application here. For in no uncertain terms the new regulation of October 5, as approved by the President, and the same requirement in the later Executive Order were expressly made inapplicable to construction commenced before October 5, 1943, as was the Tidd project. Thus, even though WPB had the power to limit amortizable cost prospectively in accordance with the policy adopted in the new regulation, as this Court has held in *Allen-Bradley* and *National Lead*, obviously it could not exercise that power in this case retrospectively in violation of the Executive Order prescribing its authority and of the administrative regulation approved by the President.

The action of the Board in applying the excess-war-cost limitation here, where construction was commenced prior to October 5, 1943, is in violation of the Executive Order and flies in the teeth of the regulation; it was "lawless and beyond its jurisdiction." See *Estep* v. *United States*, 327 U.S. 114, 121.[9]

II. THE PETITION FOR REHEARING SHOULD BE DENIED BECAUSE THE ORIGINAL PETITION FOR A WRIT WAS FILED OUT OF TIME.

The written opinion of the Court of Claims in this case was handed down on March 1, 1955. The Government took no action until more than 90 days after that date; on June 17, 1955, it applied to this Court for an extension of time in which to file a petition for a writ of certiorari. The request for extension was timely filed if the proper date for filing begins to run from March 30, 1955, when the Court entered the monetary judgment. Rule 38(c) of the Court of Claims provides, in substance, that its decision determining the rights of the parties constitutes its final judgment.

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[9] The Board's action in applying the excess-war-cost rule to the Tidd project, construction of which was commenced prior to the date of the amended regulation, violates elementary notions of fair play. By its express terms, the amended regulation applied only prospectively. A changed regulation unlimited as to its effective date of application has frequently been condemned when applied to prior conduct. *Arizona Grocery Co.* v. *Atchison T.S.R. Co.*, 284 U.S. 370; *Miller* v. *United States*, 294 U.S. 435; *Helvering* v. *R. J. Reynolds Tob. Co.*, 306 U.S. 110; *NLRB* v. *Guy Atkinson Co.*, (CA 9, 1952) 195 F. 2d 141, Note, 66 Harv. L. Rev. 348 (1952); cf. *Campbell* v. *Galeno Chemical Co.*, 281 U.S. 599, 610; *Helvering* v. *Wilshire Oil Co.*, 308 U.S. 90, rehearing den. 308 U.S. 638. See Vom Bauer, Federal Administrative Law 491 (1942); Griswold, "A Summary of the Regulations Problem," 54 Harv. L. Rev. 398 (1941). Cf. Cardozo, The Nature of the Judicial Process, 147 (1920).

We submit that there cannot be two dates for the beginning of the 90 day period for filing petitions for writs of certiorari to the Court of Claims.

We continue to urge that the Government's original petition for certiorari cannot in any event be granted because it was not filed within the time allowed by 28 U.S.C. Sec. 2101(c). We will not repeat our argument here, which is set forth in our original Brief in Opposition to the Government's Petition for Certiorari (p. 2, n. 2), and our Brief in Opposition to Motion of the United States for Leave to File a Petition for Rehearing, filed May 16, 1956 (pp. 13-15). We believe, however, that the merit of our position has been underscored by the recent decision of the full bench of the Court of Appeals for the Second Circuit in *F. & M. Schaefer Brewing Co.* v. *United States,* 236 F. 2d 889 (1956), dealing with the timeliness of appeals under comparable provisions of the Federal Rules of Civil Procedure. Accord: *Matteson* v. *United States,* P-H Fed. Tax Service, ¶ 140,359. An apparently conflicting decision has been reached by the Court of Appeals for the First Circuit. *United States* v. *Higginson,* 238 F. 2d 439 (1956), and the Government has filed a petition for a writ of certiorari in the *Schaefer Brewing Co.* case (O.T. 1956 No. 761).

III. THE PETITION FOR REHEARING SHOULD BE DENIED BECAUSE THIS COURT'S DENIAL OF THE PETITION FOR REHEARING ON DECEMBER 5, 1955 BROUGHT THE LITIGATION IN THE OHIO POWER CASE TO FINALITY UNDER THE RULES OF THIS COURT AND THE JUDICIAL CODE, AND TO REVIVE THAT PETITION VIOLATES THOSE RULES AND ESTABLISHES A NEW PRECEDENT WHICH WILL IMPEDE THE ADMINISTRATION OF JUSTICE.

In our "Motion to Vacate Order of June 11, 1956 and to dismiss petition for rehearing filed November 10, 1955," filed with this Court on October 12, 1956, we urged that this Court's denial of the petition for rehearing on December 5, 1955 brought the litigation to finality under the clear and specific provisions of Rule 58(4) of this Court and of Section 452 of the Judicial Code. In its memorandum of October 1956 (p. 2) in response to this motion, the Government did not reply to our arguments but instead requested the Court to hold this issue in abeyance pending decision of *Allen-Bradley* and *National Lead,* since a decision for the taxpayers in those cases would make unnecessary any further consideration of this question.

Our argument on this point is fully set forth in the above document on pages 7 to 20, inclusive, and accordingly will not be repeated here. For the reasons there

set forth, however, we believe that at this time, over a year after denial of the Government's initial petition for rehearing of denial of certiorari and some seven months after denial of a motion for leave to file a second and out-of-time petition for rehearing (351 U.S. 958), this Court should not reconsider this case on the merits. To do so would violate the fundamental principles of finality contained both in its rules and in the provisions of the Judicial Code.

CONCLUSION

The continued petition for rehearing of denial of certiorari should be denied because (1) the decision below is plainly correct on the facts presented and should not be disturbed; (2) the Government's original petition for certiorari was not filed within the time prescribed by applicable law; and (3) the decision of this Court denying the Government's timely petition for rehearing of denial of certiorari on December 5, 1955 terminated the litigation under this Court's rules and the provisions of the Judicial Code, and should not now be reconsidered.

If, however, this Court should disagree with us and should grant the pending petition for rehearing and the petition for certiorari, we respectfully urge that this cause be set down for argument on all of the substantive and procedural questions herein presented. The deliberate application of a regulation contrary to its expressed limitations is a matter of such importance that it should not be sanctioned without opportunity for full briefs and argument. The question of the proper meaning and effect of the principles of finality embodied in this Court's Rule 58(4) and Section 452 of the Judicial Code presents a ques-

tion of great importance to the sound and efficient administration of justice. The same can be said for the issue as to when a judgment of the Court of Claims becomes final, for purposes of certiorari, and the relationship of that question to the issue now pending before the Court in the *Schaefer* case. On both of these latter issues an opinion of this Court, rendered after full argument, is urgently needed for the enlightenment and guidance of litigants and of the Bar.

Accordingly, we submit that this case is not one for which summary disposition upon grant of certiorari is appropriate. In the event, however, that summary disposition on the merits is nevertheless to be ordered, we respectfully urge that the proper procedure would be not to reverse the judgment of the Court of Claims on the authority of *Allen-Bradley* and *National Lead,* but rather to vacate the judgment of that Court and remand the cause for consideration of the questions peculiar to this litigation which were not reached by that Court when the cause was last before it. Cf. *Mitchell* v. *United States,* 348 U.S. 905.

Respectfully submitted,

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